

## **Document 1**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF PENNSYLVANIA

ROBERT EARTHMAN,	:	
Petitioner,	:	
- v -	:	Civil Action No. 05-188 (Erie)
	:	
WARDEN JAMES F. SHERMAN,	:	
Respondent,	:	

**DECLARATION OF JOYCE HORIKAWA**

I, Joyce Horikawa, make the following declaration under penalty of perjury:

1. I am a Senior Attorney Advisor, employed by the United States Department of Justice, Federal Bureau of Prisons, Northeast Regional Office, Philadelphia, Pennsylvania. I have been employed in this capacity since approximately April 8, 2001.

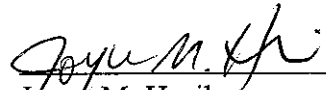
2. As an Attorney Advisor at the Bureau's Northeast Regional Office, I have access to most records maintained in the ordinary course of business in the Bureau of Prisons Northeast Regional Office, including records maintained in the Bureau's computerized database.

3. Attached hereto, please find true and correct copies of the following documents that are maintained in the ordinary course of business at the Bureau of Prisons Northeast Regional Office:

- a. Public Information Data for inmate Robert Eugene Earthman, Reg. No. 62089-061;
- b. Request for Administrative Remedy, Case Number 340482-F1, and Response;
- c. Regional Administrative Remedy Appeal, Case Number 340482-R1, and Response;
- d. Central Office Administrative Remedy Appeal, Case Number 340482-A1, and Response;
- e. Inmate History, Drug Programs, Inmate Robert Eugene Earthman, Reg. No. 62089-061;
- f. Bureau of Prisons Program Statement 5110, Drug Abuse Programs Manual, Inmate, Chapter 6, pp. 1-3; and
- g. Bureau of Prisons Program Statement 5162.04, Categorization of Offenses.

I declare the foregoing is true and correct to the best of my knowledge and belief, and is given under penalty of perjury pursuant to 28 U.S.C. § 1746.

Executed this 12<sup>th</sup> day of September, 2005.

  
\_\_\_\_\_  
Joyce M. Horikawa  
Senior Attorney Advisor  
Federal Bureau of Prisons  
Philadelphia, PA

o

## **Document 1a**

NERH4  
PAGE 001\*  
\*PUBLIC INFORMATION  
INMATE DATA  
AS OF 09-09-2005\*  
\*09-09-2005  
09:44:21

REGNO...: 62089-061 NAME: EARTHMAN, ROBERT EUGENE

RESP OF: MCK / DESIGNATED, AT ASSIGNED FACIL  
PHONE...: 814-362-8900 FAX: 814-363-6821RACE/SEX...: BLACK / MALE  
DOB/AGE....: 12-03-1950 / 54  
PAR ELIG DT: N/A  
PAR HEAR DT:

FBI NUMBER.: 604063J6

PROJ REL MT: GOOD CONDUCT TIME RELEASE

PROJ REL DT: 12-09-2006

## ----- ADMIT/RELEASE HISTORY -----

FCL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
MCK	A-DES	DESIGNATED, AT ASSIGNED FACIL	08-20-2004 0930	CURRENT
B01	RELEASE	RELEASED FROM IN-TRANSIT FACIL	08-20-2004 0930	08-20-2004 0930
B01	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	08-20-2004 0637	08-20-2004 0930
ALW	TRANSFER	TRANSFER	08-20-2004 0637	08-20-2004 0637
ALW	A-DES	DESIGNATED, AT ASSIGNED FACIL	05-20-2004 1441	08-20-2004 0637
5-R	RELEASE	RELEASED FROM IN-TRANSIT FACIL	05-20-2004 1441	05-20-2004 1441
5-R	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	05-20-2004 1425	05-20-2004 1441
ALF	HLD REMOVE	HOLDOVER REMOVED	05-20-2004 1425	05-20-2004 1425
ALF	A-BOP HLD	HOLDOVER FOR INST TO INST TRF	05-19-2004 2304	05-20-2004 1425
0-B	RELEASE	RELEASED FROM IN-TRANSIT FACIL	05-19-2004 2304	05-19-2004 2304
0-B	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	05-19-2004 2300	05-19-2004 2304
ALW	TRANS SEG	TRANSFER-SEGREGATION	05-19-2004 2300	05-20-2004 1441
ALW	A-DES	DESIGNATED, AT ASSIGNED FACIL	05-19-2004 2233	05-19-2004 2300
7-C	RELEASE	RELEASED FROM IN-TRANSIT FACIL	05-19-2004 2233	05-19-2004 2233
7-C	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	05-19-2004 0730	05-19-2004 2233
ELK	FURL TR NC	FURL W/UNESCORT TRF NOT TO CCC	05-19-2004 0730	05-19-2004 0730
ELK	A-DES	DESIGNATED, AT ASSIGNED FACIL	12-13-2000 1735	05-19-2004 0730
A01	RELEASE	RELEASED FROM IN-TRANSIT FACIL	12-13-2000 1735	12-13-2000 1735
A01	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	12-13-2000 0800	12-13-2000 1735
BRO	HLD REMOVE	HOLDOVER REMOVED	12-13-2000 0800	12-13-2000 0800
BRO	A-BOP HLD	HOLDOVER FOR INST TO INST TRF	11-29-2000 1812	12-13-2000 0800
B01	RELEASE	RELEASED FROM IN-TRANSIT FACIL	11-29-2000 1812	11-29-2000 1812
B01	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	11-29-2000 0550	11-29-2000 1812
LEW	HLD REMOVE	HOLDOVER REMOVED	11-29-2000 0550	11-29-2000 0550
LEW	A-BOP HLD	HOLDOVER FOR INST TO INST TRF	11-15-2000 1935	11-29-2000 0550
B10	RELEASE	RELEASED FROM IN-TRANSIT FACIL	11-15-2000 1935	11-15-2000 1935
B10	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	11-15-2000 0547	11-15-2000 1935
PET	HLD REMOVE	HOLDOVER REMOVED	11-15-2000 0547	11-15-2000 0547
PET	A-BOP HLD	HOLDOVER FOR INST TO INST TRF	10-24-2000 2038	11-15-2000 0547
B09	RELEASE	RELEASED FROM IN-TRANSIT FACIL	10-24-2000 2038	10-24-2000 2038
B09	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	10-24-2000 0518	10-24-2000 2038
ATL	HLD REMOVE	HOLDOVER REMOVED	10-24-2000 0518	10-24-2000 0518
ATL	A-BOP HLD	HOLDOVER FOR INST TO INST TRF	10-19-2000 2231	10-24-2000 0518
B02	RELEASE	RELEASED FROM IN-TRANSIT FACIL	10-19-2000 2231	10-19-2000 2231
B02	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	10-19-2000 0651	10-19-2000 2231
ASH	TRANSFER	TRANSFER	10-19-2000 0651	10-19-2000 0651

G0002

MORE PAGES TO FOLLOW . . .

NERH4  
PAGE 002

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PUBLIC INFORMATION  
INMATE DATA  
AS OF 09-09-2005

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09-09-2005  
09:44:21

REGNO... 62089-061 NAME: EARTHMAN, ROBERT EUGENE

RESP OF: MCK / DESIGNATED, AT ASSIGNED FACIL  
PHONE...: 814-362-8900 FAX: 814-363-6821

ASH	A-DES	DESIGNATED, AT ASSIGNED FACIL	03-02-2000	1157	10-19-2000	0651
ASH	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	03-02-2000	0932	03-02-2000	1157
ASH	A-DES	DESIGNATED, AT ASSIGNED FACIL	01-08-1999	1631	03-02-2000	0932
3-E	RELEASE	RELEASED FROM IN-TRANSIT FACIL	01-08-1999	1631	01-08-1999	1631
3-E	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	01-08-1999	1402	01-08-1999	1631
LEX	TRANSFER	TRANSFER	01-08-1999	1402	01-08-1999	1402
LEX	A-DES	DESIGNATED, AT ASSIGNED FACIL	07-08-1997	1525	01-08-1999	1402
LEX	ESCORT TRP	ESC TRIP OTHER THAN LOCAL HOSP	07-08-1997	1238	07-08-1997	1525
LEX	A-DES	DESIGNATED, AT ASSIGNED FACIL	06-09-1997	1436	07-08-1997	1238
LEX	COURT	COURT APPEARANCE W/SCHED RETRN	06-09-1997	0955	06-09-1997	1436
LEX	A-DES	DESIGNATED, AT ASSIGNED FACIL	10-22-1996	1034	06-09-1997	0955
LEX	ESCORT TRP	ESC TRIP OTHER THAN LOCAL HOSP	10-22-1996	0750	10-22-1996	1034
LEX	A-DES	DESIGNATED, AT ASSIGNED FACIL	11-03-1994	1116	10-22-1996	0750
S04	RELEASE	RELEASED FROM IN-TRANSIT FACIL	11-03-1994	1116	11-03-1994	1116
S04	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	11-03-1994	0645	11-03-1994	1116
ASH	TRANSFER	TRANSFER	11-03-1994	0645	11-03-1994	0645
ASH	A-DES	DESIGNATED, AT ASSIGNED FACIL	07-07-1994	1840	11-03-1994	0645
ASH	ESCORT TRP	ESC TRIP OTHER THAN LOCAL HOSP	07-07-1994	0830	07-07-1994	1840
ASH	A-DES	DESIGNATED, AT ASSIGNED FACIL	06-09-1994	1420	07-07-1994	0830
ASH	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	06-09-1994	1305	06-09-1994	1420
ASH	A-DES	DESIGNATED, AT ASSIGNED FACIL	03-25-1994	1123	06-09-1994	1305
ASH	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	03-25-1994	0940	03-25-1994	1123
ASH	A-DES	DESIGNATED, AT ASSIGNED FACIL	11-18-1992	1130	03-25-1994	0940
ASH	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	11-18-1992	0930	11-18-1992	1130
ASH	A-DES	DESIGNATED, AT ASSIGNED FACIL	11-12-1992	1124	11-18-1992	0930
ASH	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	11-12-1992	0724	11-12-1992	1124
ASH	A-DES	DESIGNATED, AT ASSIGNED FACIL	09-02-1992	1527	11-12-1992	0724
ASH	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	09-02-1992	1310	09-02-1992	1527
ASH	A-DES	DESIGNATED, AT ASSIGNED FACIL	08-05-1991	1600	09-02-1992	1310
B02	RELEASE	RELEASED FROM IN-TRANSIT FACIL	08-05-1991	1600	08-05-1991	1600
B02	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	08-05-1991	0241	08-05-1991	1600
ATL	HLD REMOVE	HOLDOVER REMOVED	08-05-1991	0241	08-05-1991	0241
ATL	A-HLD	HOLDOVER, TEMPORARILY HOUSED	07-22-1991	1237	08-05-1991	0241
A01	RELEASE	RELEASED FROM IN-TRANSIT FACIL	07-22-1991	1237	07-22-1991	1237
A01	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACIL	07-22-1991	0600	07-22-1991	1237
ERE	HLD REMOVE	HOLDOVER REMOVED	07-22-1991	0500	07-22-1991	0500
ERE	A-HLD	HOLDOVER, TEMPORARILY HOUSED	07-16-1991	1915	07-22-1991	0500
A02	RELEASE	RELEASED FROM IN-TRANSIT FACIL	07-16-1991	2015	07-16-1991	2015

G0002

MORE PAGES TO FOLLOW . . .

NERH4 \* PUBLIC INFORMATION \* 09-09-2005  
 PAGE 003 \* INMATE DATA \* 09:44:21  
 AS OF 09-09-2005

REGNO...: 62089-061 NAME: EARTHMAN, ROBERT EUGENE

RESP OF: MCK / DESIGNATED, AT ASSIGNED FACIL  
 PHONE...: 814-362-8900 FAX: 814-363-6821

PRE-RELEASE PREPARATION DATE: 06-09-2006

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S CURRENT COMMITMENT.  
 THE INMATE IS PROJECTED FOR RELEASE: 12-09-2006 VIA GCT REL

-----CURRENT JUDGMENT/WARRANT NO: 010 -----

COURT OF JURISDICTION.....: OHIO, SOUTHERN DISTRICT  
 DOCKET NUMBER.....: CR-2-89-162  
 JUDGE.....: GRAHAM  
 DATE SENTENCED/PROBATION IMPOSED: 01-19-1990  
 DATE COMMITTED.....: 03-13-1990  
 HOW COMMITTED.....: US DISTRICT COURT COMMITMENT  
 PROBATION IMPOSED.....: NO

	FELONY ASSESS	MISDMNR ASSESS	FINES	COSTS
NON-COMMITTED.:	\$200.00	\$00.00	\$00.00	\$00.00
RESTITUTION...:	PROPERTY: NO	SERVICES: NO	AMOUNT:	\$00.00

-----CURRENT OBLIGATION NO: 010 -----

OFFENSE CODE.....: 391  
 OFF/CHG: 21:846,841CONSP TO POS & PWITD COCAINE;21:845 PWID COCAINE  
 NEAR SCHOOL;21:856 CONTROL PROP. FOR PURPOSE STORING CRACK

SENTENCE PROCEDURE.....: 3559 SRA SENTENCE  
 SENTENCE IMPOSED/TIME TO SERVE.: 300 MONTHS  
 TERM OF SUPERVISION.....: 5 YEARS  
 NEW SENTENCE IMPOSED.....: 240 MONTHS  
 BASIS FOR CHANGE.....: RULE 35 DEFENDANT APPEAL  
 DATE OF OFFENSE.....: 08-06-1988

G0002 MORE PAGES TO FOLLOW . . .

NERH4 \* PUBLIC INFORMATION \* 09-09-2005  
 PAGE 004 OF 004 \* INMATE DATA \* 09:44:21  
 AS OF 09-09-2005

REGNO...: 62089-061 NAME: EARTHMAN, ROBERT EUGENE

RESP OF: MCK / DESIGNATED, AT ASSIGNED FACIL

PHONE...: 814-362-8900 FAX: 814-363-6821

-----CURRENT COMPUTATION NO: 010 -----

COMPUTATION 010 WAS LAST UPDATED ON 03-20-1998 AT LEX AUTOMATICALLY

THE FOLLOWING JUDGMENTS, WARRANTS AND OBLIGATIONS ARE INCLUDED IN  
 CURRENT COMPUTATION 010: 010 010

DATE COMPUTATION BEGAN.....: 01-19-1990  
 TOTAL TERM IN EFFECT.....: 240 MONTHS  
 TOTAL TERM IN EFFECT CONVERTED...: 20 YEARS  
 EARLIEST DATE OF OFFENSE.....: 08-06-1988

JAIL CREDIT.....:	FROM DATE	THRU DATE
	08-06-1988	08-07-1988
	07-10-1989	01-18-1990

TOTAL PRIOR CREDIT TIME.....: 195  
 TOTAL INOPERATIVE TIME.....: 0  
 TOTAL GCT EARNED AND PROJECTED...: 941  
 TOTAL GCT EARNED.....: 864  
 STATUTORY RELEASE DATE PROJECTED: 12-09-2006  
 SIX MONTH /10% DATE.....: N/A  
 EXPIRATION FULL TERM DATE.....: 07-07-2009

PROJECTED SATISFACTION DATE.....: 12-09-2006  
 PROJECTED SATISFACTION METHOD...: GCT REL

S0055 NO PRIOR SENTENCE DATA EXISTS FOR THIS INMATE



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## **Document 1b**

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: EARTHMAN, ROBERT E. 62089-061 BA ALW PRISON Camp  
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A- INMATE REQUEST

I'm requesting that I be considered eligible for early release for taking the 500 hours residential drug treatment program within the bureau of prisons. I was deemed ineligible for early release under 3621 (e) due to my 18 USC 924(c) firearm being vacated based on court order, I did not receive a two point enhancement because I was sentence as a career offender under the provision of U.S.S.G 4B1.1 The two level gun enhancement would not apply to the Career offender guidelines range, it would only apply to the underlying guideline range 2D1.1 Under the program statement 5162.04 States that staff shall take it for granted that if a gun charge has been vacated and a two level enhancement wasn't applied it is to be presumed that it would have unless there is a specific court order to the contrary. I was intially deemed eligible for, but not yet enrolled in, the program but that, under BOP'S subsequent definitional changes my eligibility was impermissibly revoked. SEE PAGE (2)

7-1-04

DATE

Robert E. Earthman

SIGNATURE OF REQUESTER

Part B- RESPONSE

Please refer to attached continuation sheet for response.

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 340482-F1

CASE NUMBER: 340482-F1

Part C- RECEIPT

Return to: \_\_\_\_\_  
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT: \_\_\_\_\_

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

REQUEST FOR ADMINISTRATIVE REMEDY

PAGE 2

The government had every chance in the world to take me back to court if they wanted to apply the two level enhancement, but they argued that a re-sentence hearing was not required in my case because a enhancement did not apply and wouldn't change my ultimate sentence. Being that I have been in prison for the last 15 years my case has become final. The court has no jurisdiction to give me a court order specifically denying the application of a two point enhancement because that would be modifying my sentence. See attach: Government response to request of defendant for court order denying the application of a two point enhancement for possession of a fireman also court order from the sentencing judge.

Sincerely

Robert E. Earthman



UNITED STATES GOVERNMENT  
Department of Justice  
Low Security Correctional Institution  
Allenwood Federal Correctional Complex  
White Deer, PA 17887

REQUEST FOR ADMINISTRATIVE REMEDY  
PART B - RESPONSE

EARTHMAN, ROBERT E.  
REG. NO.: 62089-061  
REMEDY ID: 340482-F1

This is in response to your Request for Administrative Remedy dated July 1, 2004, wherein you reported that you applied to the Residential Drug Abuse Program (RDAP) and were deemed eligible for an RDAP admission; however, you were found ineligible for a 3621(e) early release. You are requesting that you be considered eligible for a 3621(e) early release should you successfully complete the RDAP.

In explaining the history of how RDAP staff found you to be 3621(e) ineligible, you wrote that for your instant offense, you were convicted as a career offender and, although your 924(c) conviction was vacated, you did not receive a two-point enhancement for possession of the firearms during the commission of your instant offense. You added that: "Under the program statement 5162.04 (page 12)...staff shall take it for granted that (since your) gun charge has been vacated and a two-level enhancement wasn't applied, it is to be presumed that (the enhancement will now apply because there is no) specific court order to the contrary." You attached a copy of the "Government's Response to Request of Defendant for Court Order Denying the Application of a Two-Point Enhancement for Possession of a Firearm," which for you was an unfavorable reply from the Court on this matter. However, within the text of that response, the United States Attorney wrote that, although the Court is not in a position to specifically deny the application of a two-point enhancement, perhaps the Court could issue an order clarifying its previous intent, which may satisfy the Bureau of Prisons. Despite this recommendation from the U.S. Attorney, you are now requesting that you be deemed eligible for a 3621(e) early release.

Your record has been fully reviewed and the DAP Coordinator confirmed that your 924(c) charge has been vacated. Your file also has a copy of the Northeast Regional Assistant Counsel's recommendation for action in this regard. That recommendation reads that, although your case predates the relevant Supreme Court Bailey decision, the conditions are the same and the Bureau of Prisons should act in accordance with the Bailey finding. This decision is neither intended to discourage or encourage your further communication with the Court, so as to clarify the Court's past intent.

Your Request for Administrative Remedy is therefore denied. At this time you remain eligible for RDAP admission, but ineligible for a 3621(e) early release. If you are dissatisfied with the above findings, you may submit a Regional Appeal via Form BP-230(13) to the Northeast Regional Director within twenty calendar days from the date of this response.

07-06-04

Date

Craig Apker, Warden

 **COPY**

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

ROBERT EARTHMAN

NO. CR-2-89-162  
JUDGE GRAHAM  
MAGISTRATE JUDGE ABEL

GOVERNMENT'S RESPONSE TO  
REQUEST OF DEFENDANT FOR COURT  
ORDER DENYING THE APPLICATION  
OF A TWO POINT ENHANCEMENT  
FOR POSSESSION OF A FIREARM

Defendant Robert Earthman has sent a letter to the Court, dated April 12, 2004, requesting the Court enter an Order "specifically denying the application of a two point enhancement under the sentencing guidelines for possession of a firearm during a drug trafficking crime." Defendant seeks this Order because he is attempting to be accepted into the 500 hour residential drug abuse treatment program within the Bureau of Prisons. This would qualify Mr. Earthman for a one year reduction in sentence.

In his letter to the Court, Mr. Earthman contends the government conceded that the gun enhancement was not applicable in his case. That is not entirely true. Factually, it is the position of the United States that Mr. Earthman should receive a two-level enhancement for having firearms in connection with his drug trafficking activity. However, at the time defendant's second \$2255 petition was pending, we did agree that a re-sentencing hearing was not required in this case, following the dismissal of the \$924(c) count, because the two-level enhancement would not have changed the defendant's ultimate sentence.

As the government explained in its response to the defendant's second \$2255 petition filed in C-2-97-519 (R. 47, Response of United States to defendant's second \$2255 petition, 5/21/97),

[t]he United States agrees with the defendant's position [that his \$924(c) conviction was not sustainable in light of United States v. Bailey, 516 U.S. 137 (1995)]. The firearms found inside his residence at the time the search warrant was executed were not immediately accessible to him and were not transported by him during the underlying drug offenses, both of which are required pursuant to United States v. Riascos Suarez, 73 F.3d 616, 623 (6th Cir. 1996) and United States v. Moore, 76 F.3d 111 (6th Cir. 1996). Earthman's conviction at trial in 1989 was based on a "fortress theory" -- a theory no longer acceptable in light of Bailey and its progeny. The United States, therefore, agrees that the five year consecutive sentence imposed on Earthman's conviction on Count 4 should be vacated.

The government further argued in its response to the defendant's second \$2255 petition filed in C-2-97-519 (R. 47), that the United States did not believe a re-sentencing hearing was needed.

Since there is no longer a substantive firearms charge, a two-level enhancement for possession of a dangerous weapon during the commission of the narcotics offense is now applicable to the defendant's guideline range for Counts 1 and 2, pursuant to U.S.S.G. §2D1.1(b)(1).

However, Mr. Earthman was a career offender and sentenced under the provisions of U.S.S.G. §4B1.1. His applicable guideline range was 262 - 327 months, based on an offense level 34, criminal history category VI.<sup>1</sup> The two-level gun enhancement would not apply to the career offender guideline range. It would apply only to the underlying guideline range under §2D1.1. Applying two levels to an offense level 18, which was originally computed as applicable to this defendant under §2D1.1, the ultimate §2D1.1 guideline range would not be greater than the career offender range applicable under §4B1.1. Therefore, the sentencing guidelines applicable to the remaining counts of conviction did not change with the dismissal of Count 4.

(emphasis added)<sup>2</sup>

The government never conceded in the prior §2255 proceedings that the firearm enhancement was not factually applicable.<sup>3</sup> The government, instead, argued that such an enhancement would not change the defendant's sentence, since his

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<sup>1</sup>This Court departed downward to 240 months as the applicable sentence on Counts 1, 2, 6 & 7.

<sup>2</sup>Due to the age of this case, the United States no longer has the file for the second §2255 petition in the U.S. Attorney's Office in Columbus, Ohio. Therefore, we have been unable to locate a copy of the Court's Order in C-2-97-519. However, government counsel does have a copy of the government's response filed in C-2-97-519 on the hard-drive of her computer. Thus, government counsel was able to reconstruct the government's argument in the prior §2255 petition.

<sup>3</sup>Attached hereto as Exhibits A and B, respectively, is a statement of the case and a statement of facts which were filed by the government in response to the defendant's appeal of his first §2255 petition. These are provided to assist the Court in reconstructing the history of this case.

sentence as a career offender was much higher than his sentence would be based upon the drugs he possessed combined with the firearm enhancement.

In conclusion, the government does not believe the Court has the ability to now issue an Order specifically denying the application of a two point enhancement for possession of a firearm under the facts of this case. However, it is the suggestion of the government that the Court could issue an Order clarifying its previous orders that a two offense level enhancement was never actually imposed in this case because a re-sentencing hearing was never held. Perhaps, such an Order would satisfy the Bureau of Prisons to allow Mr. Earthman to qualify for the 500 hour residential drug abuse treatment program.

Respectfully submitted,

GREGORY G. LOCKHART  
United States Attorney

s/Robyn Jones Hahnert  
ROBYN JONES HAHNERT (0022733)  
Assistant United States Attorney  
303 Marconi Boulevard  
Suite 200  
Columbus, Ohio 43215  
(614) 469-5715  
Fax: (614) 469-6895  
Robyn.Hahnert @usdoj.gov



CERTIFICATE OF SERVICE

A copy of this response was mailed to Robert Earthman,  
FCI Elkton, Unit A/B, P.O. Box 10, Lisbon, Ohio 44432, on April  
21, 2004.

s/Robyn Jones Hahnert  
ROBYN JONES HAHNERT (0022733)  
Assistant United States Attorney

**FILED**

TIME: \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

APR 29 2004

JAMES BONINI, Clerk  
COLUMBUS, OHIO

United States of America

v.

Case No. 2:89-CR-162-1

Robert Earthman

ORDER

The court has received a letter from the defendant in which he requests the court to enter an order "specifically denying the application of a two point enhancement for possession of a firearm." Defendant alleges that he has been denied placement in the 500 Hour Residential Drug Abuse Treatment Program due to the information in his presentence investigation report concerning his possession of firearms in connection with a drug offense.


The defendant was originally sentenced on January 19, 1990, for various drug offenses and for carrying or using a firearm in connection with a drug offense in violation of 18 U.S.C. §924(c). Since defendant was sentenced on the firearm count as well as the drug offenses, the two-level enhancement for the presence of a firearm was not actually applied in calculating the defendant's sentence. The issue of whether the defendant in fact possessed firearms in a manner which would satisfy the requirements for the two-level firearm enhancement under U.S.S.G. §2D1.1(b)(1) was never raised or litigated by the parties at the time of sentencing.

Defendant later filed a habeas petition under 28 U.S.C. §2255, asserting that his conviction for the firearms offense

under §924(c) was not supported by the evidence in light of the new construction of the elements of that offense announced in United States v. Bailey, 516 U.S. 137 (1995). The government agreed that defendant's §924(c) conviction was invalid under Bailey, and defendant's conviction for that offense was vacated. The government argued that the two-level enhancement for the presence of firearms during the drug offense was then applicable. However, a sentencing hearing concerning the factual support for the two-level firearm enhancement was not held at that time because the career offender guidelines applicable to defendant's case resulted in a higher sentencing range than would have otherwise applied to the remaining drug convictions, making the question of whether defendant should receive the two-level enhancement irrelevant to the calculation of the defendant's sentence. Thus, the firearm enhancement has never been used in determining the defendant's sentence. The defendant's sentence has become final and the court has no jurisdiction to modify it.

The court lacks jurisdiction to consider defendant's request. Therefore, the defendant's motion for an order "specifically denying the application of a two point enhancement for possession of a firearm" is denied.

It is so ordered.

  
\_\_\_\_\_  
s/James L. Graham  
James L. Graham  
Chief United States District Judge

Date: April 29, 2004

ALW 1330.13C

Attachment 1

### INFORMAL ATTEMPT TO RESOLVE PROBLEM

As outlined in the governing Program Statement, Administrative Remedy Program, an attempt to informally resolve a problem should be made prior to the submission of a BP-9. Any FPC Allenwood inmate submitting a Request for Administrative Remedy must state in writing the attempts made at an informal resolution by answering the questions below.

This is the preferred course of action intended to minimize time and effort on the part of both staff and inmate, and to maintain the effectiveness of the program.

1. Name of Inmate and Registration Number:

ROBERT E. EARTHMAN #62089-061

2. Nature of Complaint (State briefly what the problem is.):

I WAS TOLD THAT I'M INELIGIBLE FOR EARLY RELEASE UNDER  
3621(e) DUE TO MY 924(L) CONVICTION BEING VACATED  
BASED ON COURT ORDER AND EVEN THOUGH I DIDN'T  
RECEIVE A TWO POINT ENHANCEMENT IT IS PRESUMED  
THAT I WOULD HAVE

3. Efforts Made to Resolve the Problem (Include contacts with staff [by name], use of request slips, etc.):

I'VE SPOKE WITH DR. FINDLAY AND TRIED TO EXPLAIN TO  
HIM THAT A TWO POINT ENHANCEMENT DID NOT APPLY TO  
CAREER OFFENDER, I TRIED TO SHOW HIM A LETTER FROM THE  
JUDGE AND A GOVERNMENT RESPONSE

4. Counselor's Comments (Include efforts made to resolve informally.):

I SPOKE WITH DRUG TREATMENT STAFF  
WHO STATED YOU WERE INELIGIBLE FOR TIME  
OFF THE DECISION WAS MADE AT THE  
REGIONAL LEVEL

M. J. [Signature]  
Correctional Counselor's Signature

6-22-04  
Date of Response

## **Document 1c**

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-DIR-9 including any attachments must be submitted with this appeal.

From: Guzmon, Robert 01089-061 K/D Allenwood Camp  
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A—REASON FOR APPEAL

I'm requesting that I be considered eligible for early release for taking the 500 hours residential drug abuse treatment program within the Bureau of Prisons. In 1990 I was sentence to 240 months as a career offender and 60 months for a 924(c) firearm charge, in 1997 my firearm conviction was vacated due to the Bailey Decision. Since I was sentence as a career offender under the provisions of U.S.S.C. 4B1.1 career offender guidelines the two-level gun enhancement would not apply. The Bureau of Prisons program statement 5162.04 states that a 924(c) CONVICTION that was subsequently vacated due to the Bailey Decision staff shall presume that the inmate would have received a two-level enhancement for possession of a firearm unless there is a specific court order to the contrary. I've wrote the courts requesting a court order denying the application of a two point enhancement for a possession of a firearm, being that my conviction is 15 years old and has become final the the courts lacks jurisdiction to consider my request until I exhaust all my administrative remedies, first and then file 2241 Habeas Corpus. If the Government had chose not to sentence me as a career offender then the two level enhancement would have applied to my sentence. *Robert Guzman*

DATE

See attached 2nd page

SIGNATURE OF REQUESTOR

Part B—RESPONSE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

FIRST COPY, REGIONAL FILE COPY

CASE NUMBER: \_\_\_\_\_

Part C—RESPONSE

CASE NUMBER: \_\_\_\_\_

Return to: \_\_\_\_\_  
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT: \_\_\_\_\_

2nd PAGE OF Regional Administrative Remedy Appeal

Robert Earthman Reg# 62089-061 Unit B/B Institution Allenwood

Continued- The two level enhancement would have applied to my sentence.

Attach is a copy of the government response and if you would read the foot note at the bottom of page (2) And top of page (3) it would clearly state that the two- level gun enhancement would not apply to the career offender guideline range which i was sentence to. I really wish this could be resolved at the regional level.

**EARTHMAN, Robert Eugene**

Reg. No. 62089-061

Appeal No. 340482-R1

Page One

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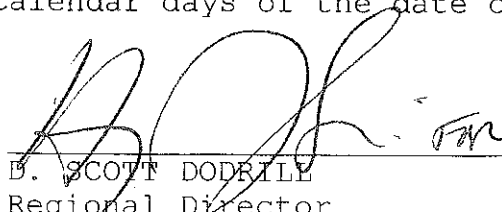
**Part B - Response**

In your appeal, you appeal the decision of the Warden at FCI Allenwood advising you are ineligible for early release upon successful completion of the 500-hour Residential Drug Abuse Program.

As indicated by the Warden, your case was thoroughly reviewed for early release consideration after your 18 U.S.C. 924(c) conviction was vacated. We concur that there is sufficient evidence that your federal offense involved the use of a firearm. Program Statement 5330.10, Inmate Drug Abuse Programs Manual, Chapter 6, Page 1, and 28 C.F.R. § 550.58 provide that an inmate whose current offense involved the carrying, possession or use of a firearm is not eligible for early release under § 3621(e). We concur with the Warden's response and you are ineligible for early release under 18 U.S.C. § 3621(e). Accordingly, your appeal is denied.

If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons. Your appeal must be received in the Administrative Remedy Section, Office of General Counsel, Federal Bureau of Prisons, 320 First Street, N.W., Washington, D.C. 20534, within 30 calendar days of the date of this response.

Date: August 19, 2004

  
B. SCOTT DODRILL  
Regional Director



## **Document 1d**

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-DIR-9 and BP-DIR-10, including any attachments must be submitted with this appeal.

From:				
	<u>LAST NAME, FIRST, MIDDLE INITIAL</u>	<u>REG. NO.</u>	<u>UNIT</u>	<u>INSTITUTION</u>

[illegible]

The second intent of the memo was to make the N.O.P. Central Office aware that there will be a problem with legal mail leaving this institution. As I mentioned at the beginning of this report, the previous decision is essentially a duplicate of a SP-11 allegedly receipted by your office on September 19, 1964. There are a number of circumstances surrounding the mailing of the letter and the receipt of the response that I need to indicate. The return receipts were not signed. 2. The envelope which contained the response from the N.O.P. Central Office (Washington, D.C.) was received by the Post Office in Bradford, PA. not Washington and

DATE \_\_\_\_\_

**SIGNATURE OF REQUESTER**

### Part B—RESPONSE

DATE: \_\_\_\_\_

GENERAL COUNSEL

SECOND COPY: REGIONAL FILE COPY

CASE NUMBER: \_\_\_\_\_

## Part C—RECEIPT

CASE NUMBER: \_\_\_\_\_

Return to: \_\_\_\_\_

LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION
----------------------------------	----------	------	-------------

SUBJECT: \_\_\_\_\_

DATE: \_\_\_\_\_

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

<u>Earthman, Robert</u>	<u>62089-061</u>	<u>E</u>	<u>FPC McKean</u>
Name	REG. NO.	UNIT	INSTITUTION

Central Office Administrative remedy Appeal, continued.

3. The manilla envelope had no return address in the upper left corner, preprinted or otherwise, to suggest its origin, 4. Though the alleged "Rejection Notice - Administrative Remedy" contained in the envelope was dated September 27, 2004, it was not postmarked until October 7, 2004 (from apparantly the wrong Post Office) and moreover, 5. Though postmarked on October 7, 2004, I did not receive the envelope until October 12, 2004. This conveniently coicides with the 15 day expiration until which I may "resubmit [the] appeal in proper form." 6. Lastly, I am certain I enclosed the correct number of copies of administrative remedies, which was the other reason for rejection.

I hope this is not a case of tampering with United States mail by the institution in order to prevent me from completing the administrative remedy process. I would expect an investigation to follow. I sincerely appreciate your time and attention in researching this matter.

Respectfully Submitted,

Robert Earthman  
Name

62089-061  
Registration Number

10-26-04  
Date

Administrative Remedy No. 340482-A2

Part B - Response

You contend you have wrongly been denied eligibility for early release pursuant to 18 U.S.C. § 3621(e) for successful completion of the Residential Drug Abuse Program (RDAP). You request to be deemed eligible for early release.



Our review of this matter reveals that both the Warden and the Regional Director have adequately addressed your concerns. Program Statement 5330.10, Drug Abuse Programs Manual, Inmate, provides in Section 6.1.1 that "as an exercise of the discretion vested in the Director of the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release...inmates whose current offense is a felony...that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives..."

Program Statement 5162.04, Categorization of Offenses, provides in Section 7(b) that "in some cases, an inmate may be convicted of an offense listed in this section as well as 18 U.S.C. § 924(c)(1), use of a firearm during a crime of violence or drug trafficking crime. According to the U.S. Sentencing Guidelines, if a defendant receives a § 924(c)(1) conviction, the court may not assess a two-level "Specific Offense Characteristic" enhancement for possession of a firearm; however, in light of the Supreme Court ruling in *Bailey v. U.S.*, 116 S.Ct. 501 (1995), a number of § 924(c)(1) convictions have been vacated. In *Bailey*, the Court held that the term "use" connotes an active employment of the firearm. If any of the offenses listed in this section were accompanied by a § 924(c)(1) conviction that was subsequently vacated due to the *Bailey* decision, staff shall presume that the inmate would have received a two-level "Specific Offense Characteristic" enhancement for possession of a firearm unless there is a specific court order to the contrary. Thus, absent a court order specifically denying the application of a two point enhancement for possession of a firearm, the inmate will not receive certain Bureau program benefits."

Inasmuch as there is no order denying the application of the presumptive enhancement, you remain ineligible for early release. The court's reasoning for not considering your request for such an order is irrelevant.

Your appeal is denied.

January 5, 2005  
Date

  
Harrell Watts, Administrator  
National Inmate Appeals 

o

**Document 1e**

NERH4 531.01 \* INMATE HISTORY \* 09-09-2005  
PAGE 001 OF 001 \* DRUG PGMS \* 09:46:02

REG NO.: 62089-061 NAME....: EARTHMAN, ROBERT EUGENE  
CATEGORY: DRG FUNCTION: PRT FORMAT:

FCL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
MCK	DAP PART	RESIDENT DRUG TRMT PARTICIPANT	01-12-2005 0836	CURRENT
MCK	DRG E COMP	DRUG EDUCATION COMPLETED	07-27-1992 1514	CURRENT
MCK	DRG I NONE	NO DRUG INTERVIEW REQUIRED	05-17-1995 1505	CURRENT
MCK	INELIGIBLE	18 USC 3621 RELEASE INELIGIBLE	03-08-2004 1539	CURRENT
MCK	NR COMP	NRES DRUG TMT/COMPLETE	09-26-2001 1518	CURRENT
MCK	DAP WAIT	RESIDENT DRUG TRMT WAITING	03-08-2004 1539	01-12-2005 0836
ELK	NR PART	NRES DRUG COUNSEL PARTICIPANT	07-18-2001 0939	09-26-2001 1518

G0000 TRANSACTION SUCCESSFULLY COMPLETED